

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	
)	
CAROLYN ROBERTS HORECKER,)	Bankruptcy Case No. 92-41158
)	
Debtor.)	
_____)	
)	
KNIGHTSBRIDGE WINE SHOPPE,)	
LTD.,)	
)	
Plaintiff,)	
)	
vs.)	Adversary Case No. 93-4073
)	
CAROLYN ROBERTS HORECKER,)	
)	
Defendant.)	

OPINION

This matter having come before the Court for trial on a Complaint Objecting to Discharge filed by the Plaintiff on July 12, 1993; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Plaintiff has brought the instant adversary complaint seeking a denial of the Defendant's discharge under Chapter 7 of the Bankruptcy Code pursuant to three separate sub-sections of 11 U.S.C. § 727(a). Plaintiff has alleged a cause of action pursuant to 11 U.S.C. § 727(a)(2), charging that the Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed,

destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed, property of the Debtor within one year before the date of filing of the petition. The Plaintiff has also alleged a cause of action under 11 U.S.C. § 727(a)(3), charging that the Debtor has failed to keep or preserve recorded information, including books, documents, records, and papers from which the Debtor's financial condition or business transactions might be ascertained. Finally, the Plaintiff has alleged a cause of action pursuant to 11 U.S.C. § 727(a)(5), charging that the Debtor has failed to explain satisfactorily a substantial loss of assets to meet the Debtor's liabilities.

The burden of proof is upon the Plaintiff to establish the elements under each section of 11 U.S.C. § 727(a), by a preponderance of the evidence. See: Grogan v. Garner, 111 S.Ct. 654 (1991). Under both §§ 727(a)(3) and (a)(5), the initial burden of proof is on the Plaintiff to show the lack of business records or a loss of assets. Once this burden is met, the burden then shifts to the Defendant to explain the failure to maintain records or the loss of assets. See: In re Calisoff, 92 B.R. 346 (Bankr. N.D. Ill. 1988); and In re Silverstein, 151 B.R. 657 (Bankr. E.D. N.Y. 1993), respectively.

Prior to addressing each of the Plaintiff's contentions under 11 U.S.C. § 727(a), the Court first notes that the issue of credibility of the witnesses has a substantial impact on the Court's decision in the instant case, as in other cases where a denial of discharge is sought under 11 U.S.C. § 727(a). In the instant case,

the Court found on the record at trial that the Defendant, Carolyn Roberts Horecker, and another witness testifying on her behalf, William Sinnott, were not credible witnesses. As noted at trial, the Court has vast experience judging the credibility of witnesses. In considering the testimony of both the Defendant and William Sinnott, the Court finds that, based upon the demeanor of the witnesses, the manner in which they answered questions, and their attitude toward the proceedings, the majority of the testimony elicited by these two witnesses was not credible. The Court found that both the Defendant and Mr. Sinnott had a cavalier attitude and that many answers to questions were at the very least vague and in some instances evasive. Both the Defendant and Mr. Sinnott were found to have made inconsistent statements as between their testimony in open Court and depositions given prior to trial. The Court found the Plaintiff's witness, Johnson Ho, to be a credible witness. As such, the Court found that Mr. Ho's representation of the facts which he was aware of were more accurate and dependable than the version given by the Defendant and Mr. Sinnott.

Considering the Plaintiff's cause of action pursuant to 11 U.S.C. § 727(a)(2), as stated above, the burden of proof is on the Debtor, and the Plaintiff must show that the Debtor, with an intent to hinder, delay, or defraud a creditor, either transferred or concealed property of the Debtor from the Debtor's creditors. The Court must find that the Debtor/Defendant acted with actual intent requiring a showing of extrinsic evidence suggesting that fraud exists. In examining the facts surrounding the Plaintiff's

allegations under § 727(a)(2), the Court finds that there were two specific actions on the part of the Debtor giving rise to denial of a discharge under this section. The Plaintiff has proven that, within one year of the Debtor's filing for bankruptcy relief, the Debtor concealed funds at the Anna State Bank from Creditor, Internal Revenue Service. The evidence adduced at trial clearly indicates that the Debtor transferred money from her personal bank accounts into bank accounts in the name of her daughter and then subsequently in the name of both her daughter and son for the purpose of concealing that money from the IRS. Debtor attempted to convince the Court that the money was placed in these accounts for her children's use and to keep the money from Debtor's hands due to her gambling problem. These assertions by the Defendant were quickly eroded on cross-examination. Based upon the evidence before it, the Court can but conclude that the only reason the monies were transferred by the Defendant were for the purpose of concealing them from a creditor. As such, the Plaintiff has proven the basis for denial of discharge under § 727(a)(2). Debtor's fraudulent intent can clearly be inferred from the circumstances of the transactions surrounding the transfer of the money in the accounts. The Debtor's lack of candor in her testimony further serves as an indication of the Debtor's fraudulent intent. Further, under 11 U.S.C. § 727(a)(2), the Debtor transferred an interest in a partnership to her sister for the sum of \$500 shortly before filing bankruptcy. The Court finds that this transfer was made to keep Debtor's creditors from pursuing the Debtor's interest in the partnership. The Debtor testified that this

transfer was made upon advice of counsel, but there is no clear reason for counsel to have given such advice other than to shield the interest from creditors and protect Debtor's other partners. This basis is another reason sufficient to warrant denial of the Debtor's discharge in bankruptcy.

Turning next to the Plaintiff's allegations pursuant to 11 U.S.C. § 727(a)(3), the Court finds that the Plaintiff, here again, has proven its allegations under this section in that the Plaintiff has shown that the Defendant failed to maintain or keep control of business records of corporations in which the Defendant also invested huge sums of money. The Defendant has virtually no recorded information of any kind to substantiate her testimony. The Debtor, in attempting an explanation for her failure to maintain records, stated that she had little involvement in the businesses, that she allowed William Sinnott to run the businesses, and that she put money into the businesses whenever he requested it. In reviewing the testimony before the Court, the Court finds that the Debtor has not given a reasonable explanation for the nearly complete lack of records to substantiate her testimony. The Debtor was a principal party in the corporations at issue, and she had a legal responsibility to keep records or at the very least see that they were kept by someone that could be entrusted with such a responsibility. The Defendant's explanations about her failure to be able to produce books and records on the businesses were very general and, at times, evasive. Debtor asks the Court to find that her failure to keep books was justified under the circumstances of

this case in that she was a long distance from where the corporations were doing business and that as a result of the death of her husband she was simply not taking care of her business in a manner in which it should have been taken care of. Again, considering the Defendant's lack of credibility in testifying and the overwhelming amount of evidence suggesting that the corporations in question were involved in questionable business transactions of which it was shown that the Defendant had knowledge of, the Court finds that the explanation and excuse offered by the Defendant are not sufficient to justify her failure to keep and maintain books and records from which her financial condition and business transactions could be ascertained.

Finally, turning to the third allegation of the Plaintiff under 11 U.S.C. § 727(a)(5), the Court finds that the Plaintiff has met its burden of proof in showing that the Debtor has failed to satisfactorily explain her substantial loss of assets between the time of her husband's death and the time of her filing for relief in bankruptcy. In analyzing the evidence introduced to support the Plaintiff's contentions under § 727(a)(5), the Court finds that, at the time of her husband's death in 1987, the Defendant was worth somewhere in the area of \$400,000 to \$500,000. In addition to her own personal wealth, the Court finds that it has been shown that the Defendant took a sum of money in excess of \$175,000 from her grandmother's estate over which she was a guardian until April 1992. At the time of filing bankruptcy, the Debtor's bankruptcy schedules showed that she was virtually penniless and her Chapter 7 bankruptcy

was established as a no-asset case. The Plaintiff, having established that there exists an unexplained loss of assets, thus shifts the burden to the Debtor to provide a satisfactory explanation for the loss of those assets. Courts have held that vague and indefinite explanations of losses that are based upon estimates, uncorroborated by documentation, are unsatisfactory. In re Wolfson, 26 C.B.C.2d 1738 (Bankr. S.D. N.Y. 1992). Also see: In re Ridley, 24 C.B.C.2d 163 (Bankr. D. Mass. 1990). In the instant case, the Court finds that the Debtor's explanation as to the loss of a substantial amount of assets is not satisfactory as that term is contemplated under 11 U.S.C. § 727(a)(5). Although the term "satisfactory" is not defined, cases which have examined the question have found that the standard is one of credibility and that the Court has a wide latitude in determining whether the explanation is satisfactory. See: In re Nye, 64 B.R. 759 (Bankr. E.D. N.C. 1986); In re Zell, 108 B.R. 615 (Bankr. S.D. Ohio 1989); and In re Silverstein, 151 B.R. 657 (Bankr. E.D. N.Y. 1993). The Debtor's explanation as to the loss of her assets falls into two categories. One, she explains that much of the money which was spent from a period of 1989 through 1992 was money invested in the various corporations in which she was involved and the Debtor has very little idea of where that money went and offered virtually no specific information on how the money was spent other than it was spent as capital investment to meet expenses and costs of doing business. The Debtor also testified that much of the money was lost gambling; however, the Debtor provided very little documentation as to these

gambling losses. In fact, the only documentation which was provided was documentation which the Plaintiff had obtained through its investigation rather than documentation which the Debtor supplied voluntarily. Under the case law interpreting 11 U.S.C. § 727(a)(5), the Court must find that the Plaintiff has proven, by a preponderance of the evidence, that the Defendant has failed to satisfactorily explain loss of a substantial amount of assets on the part of the Debtor which could have been used to meet her financial obligations. The Debtor's explanations for the loss of her assets were very vague, general, and, as noted previously, evasive. Given the fact that the Debtor's explanations were largely unsupported by documentation, the Court finds there is little room for doubt that the Plaintiff has proven the elements necessary under § 727(a)(5).

As a final note in passing, the Court finds that the Plaintiff has also proven a basis for denial of discharge pursuant to 11 U.S.C. § 727(a)(4)(A), in that it was shown that the Debtor made false oaths on her bankruptcy petition under Chapter 7 in that she failed to list any of the corporations in which she was involved as president, sole shareholder, and director. Those omissions being material omissions, the Court could easily find another basis for denial of discharge. However, given the fact that the Plaintiff did not plead this section nor did the Plaintiff request to amend the Complaint to conform to the proofs, the Court can only comment on the proof and not use the proof as a basis for denial of discharge.

ENTERED: June 30, 1994.

/s/ GERALD D. FINES
United States Bankruptcy Judge